A

Stone World Sdn Bhd v Engareh (M) Sdn Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-2124–10 OF 2018
UMI KALTHUM, ZABARIAH YUSOF AND HANIPAH FARIKULLAH JJCA
13 NOVEMBER 2019

C

Civil Procedure — Judgments and orders — Consequential orders — Whether High Court had inherent jurisdiction/power to grant consequential orders to give effect to its earlier judgment — Whether consequential orders necessary to achieve justice or prevent abuse of process of court — Whether consequential orders particularly useful in providing justice to a party faced with an opponent bent on defying whatever judgment or order pronounced by the court — Whether in such cases the court's exercise of its inherent power to grant consequential orders did not breach the principle of functus officio or amount to altering or varying the terms of a final judgment — Whether consequential orders often necessary to 'work out' the initial judgment so as to give effect to it

D

E

The respondent ('Engareh'), which was in the business of importing and processing marble and granite stones ('the stones') for supply to dealers and wholesalers in the construction industry, had engaged the appellant ('Stone World') to carry out the cutting and processing of the stones. Disagreements between the parties led to Engareh suing Stone World for the return of the stones that were in its possession. Stone World counterclaimed for monies owing to it for processing and transportation services. The High Court allowed the claims of both parties — the counterclaim on the basis of quantum meruit — and ordered damages to be assessed. Paragraph (a) of the trial court's judgment ('the initial judgment') ordered Stone World to return the stones to Engareh within 14 days or, alternatively, allowed Engareh to collect the stones from Stone World's premises. The court subsequently issued a clarification order amending para (a) of the initial judgment to require Stone World to deliver up the stones within 30 days to an address furnished by Engareh's solicitors. Stone World flouted both the initial judgment and clarification order by refusing to return the stones. Engareh then obtained a consequential order from the court to assess damages for the loss in value of the stones on the basis that they had severely deteriorated or been rendered worthless due to weathering. Stone World's appeal to the Court of Appeal ('COA') against the consequential order was dismissed. Almost three years after the making of the consequential order and after the parties had gone through various other contentious court proceedings, Stone World applied to impeach the consequential order on the ground — which it raised for the first time — that

F

G

H

I

A the High Court had no jurisdiction to grant it. The High Court dismissed the application holding that: (a) Stone World had never questioned the lack of jurisdiction in any previous proceedings whether before the High Court or the COA; (b) under O 92 r 4 of the Rules of Court 2012 ('the ROC'), the court had inherent power/jurisdiction to grant the order to prevent injustice; (c) res B judicata and issue estoppel precluded Stone World from questioning the validity of the consequential order; and (d) Stone World had not shown that the making of the consequential order flouted any substantive statutory provision. In the instant appeal against the decision, Stone World submitted that, inter alia: (i) the court was functus officio after delivering the initial C judgment and had no power to vary its terms thereafter; Engareh should have either appealed against the initial judgment if it wished to alter its terms or commenced execution proceedings against Stone World; (ii) apart from functus officio, the application to impeach was also made in reliance upon s 44 of the Evidence Act 1950 which did not require the need to show any breach of D a substantive statutory provision; and (iii) res judicata and issue estoppel could not be invoked to defeat the allegation that the court lacked jurisdiction to grant the consequential order. Engareh, on the other hand, submitted that, inter alia: (1) the consequential order was granted in exercise of the court's E inherent jurisdiction and discretion under O 92 r 4 of the ROC to remedy the injustice caused to Engareh by Stone World's refusal to return the stones in compliance with the initial judgment and orders of the court; and (2) if Stone World was truly aggrieved by the consequential order, it should have sought leave to appeal to the Federal Court against the COA's affirmation of the order, F but it did not.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) The inherent powers of the court were a residuary and reserve power, G separate and distinct from its statutory powers, which the court was free to exercise to achieve the ends of justice or to prevent an abuse of process of court. Due to Stone World's refusal to return the stones, their original value as contemplated when the initial judgment was made had greatly diminished or the stones had become completely worthless. It was an H injustice to Engareh as the initial judgment ordering Stone World to deliver up the stones within 14 days was rendered ineffective and a mere paper judgment. Stone World's retention of the stones went against established principles of law, equity and justice. It had demonstrated a clear disregard of Engareh's rights and defied the initial judgment. It was I under those circumstances and reasoning that the High Court invoked its inherent powers/jurisdiction to grant the consequential order to give effect to the initial judgment and do justice to Engareh. There was no appealable error in the High Court's decision to make the consequential order (see paras 61, 63 & 68–69).

(2) Whether or not to grant the consequential order was a matter within the High Court's exercise of discretion to do justice to the parties and to give effect to the initial judgment. As such, the granting of the order could not amount to a variation or alteration of the initial judgment; rather, it was to 'work out' the initial judgment to give effect to the same. The essence of the initial judgment was still preserved and maintained and the court was not functus officio. The consequential order was unanimously affirmed by the COA on Stone World's appeal. What Stone World was inviting this court to do in the instant appeal was to essentially review its own decision which in the circumstances was not possible in law to do (see paras 72, 74 & 77).

(3) The High Court did not err in finding that res judicata and issue estoppel applied in the interest of justice in favour of Engareh. Clearly, the application to impeach the consequential order was a back-door attempt by Stone World to re-open a dispute which had been fully determined to its finality until the Court of Appeal and there was nothing more to be tried. The impeachment proceedings were an abuse of process of court. Four years and three months had passed between the date of the initial judgment and the date of the consequential order and thereafter almost three years elapsed before the application to impeach the consequential order was made. By that time, the materials in Stone World's possession had deteriorated and become fragile and its value had diminished tremendously due to weathering. In the light of Stone World's continuous refusal to comply with the initial judgment, clarification order, consequential order and assessment orders, Stone World could not be allowed to re-litigate the matter premised under the guise of impeachment proceedings. This was one case where finality in litigation had to be upheld. Stone World had had the benefit of, and had in fact, pursued all opportunities to have all facts and/or law considered relevant put before the trial court, the winding-up court and the appellate court (see paras 104–105 & 107).

(4) The High Court did not err in holding that Stone World's application to impeach the consequential order on the ground of lack of jurisdiction failed because it could not show that the order was made in breach of a substantive statutory provision as was laid down in the cases of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 and *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1. In that context, the High Court rightly found that s 44 of the Evidence Act 1950 had no relevance to the instant case because it was not a substantive-right provision. Whether the application to impeach was filed under s 44 or whether it was to prove lack of jurisdiction of the court, what had to be established was nothing short of a defiance of a substantive statutory provision in the making of the consequential order (see paras 86–87 & 96).

[Bahasa Malaysia summary

Responden ('Engareh'), yang menjalankan perniagaan mengimport dan memproses batu marmar dan batu granit ('batu tersebut') untuk membekal kepada peniaga dan pemborong dalam industri pembinaan, telah melantik perayu ('Stone World') untuk menjalankan pemotongan dan pemprosesan batu tersebut. Perselisihan antara pihak-pihak itu menyebabkan Engareh menyaman Stone World untuk memulangkan batu tersebut yang berada dalam simpanannya. Stone World menuntut balas untuk wang yang terhutang kepadanya bagi perkhidmatan pemprosesan dan pengangkutan. Mahkamah Tinggi membenarkan tuntutan kedua-dua pihak — tuntutan balas atas dasar kuantum meruit — dan memerintahkan ganti rugi ditaksir. Perenggan (a) penghakiman mahkamah perbicaraan ('penghakiman awal') memerintahkan Stone World untuk memulangkan batu tersebut kepada Engareh dalam masa 14 hari atau, secara alternatif, membenarkan Engareh mengumpul batu tersebut dari premis Stone World. Mahkamah kemudiannya mengeluarkan perintah penjelasan yang meminda perenggan (a) kepada penghakiman awal untuk menghendaki Stone World menyerahkan batu tersebut dalam tempoh 30 hari ke alamat yang disediakan oleh peguam Engareh. Stone World telah melanggar perintah penghakiman awal dan penjelasan kerana enggan memulangkan batu tersebut. Engareh kemudian memperoleh perintah berbangkit dari mahkamah untuk mentaksir ganti rugi kerana kehilangan nilai batu tersebut atas dasar bahawa batu tersebut telah terjejas kualitinya atau tidak berharga akibat cuaca. Rayuan Stone World ke Mahkamah Rayuan ('MR') terhadap perintah berbangkit telah ditolak. Hampir tiga tahun selepas membuat perintah berbangkit itu dan selepas pihak-pihak telah melalui pelbagai prosiding mahkamah yang lain, Stone World telah memohon untuk mencabar perintah berbangkit itu atas alasan — yang dibangkitkan untuk kali pertama — bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk memberikannya. Mahkamah Tinggi menolak permohonan itu dengan memutuskan bahawa: (a) Stone World tidak pernah mempersoalkan ketiadaan bidang kuasa dalam mana-mana prosiding sebelumnya sama ada di hadapan Mahkamah Tinggi atau MR; (b) di bawah A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('MR'), mahkamah mempunyai kuasa/bidang kuasa untuk memberikan perintah bagi mengelakkan ketidakadilan; (c) res judicata dan isu estoppel menghalang Stone World daripada mempersoalkan kesahihan perintah berbangkit itu; dan (d) Stone World tidak menunjukkan bahawa pembuatan perintah berbangkit itu melanggari mana-mana peruntukan statutori substantif. Dalam rayuan ini terhadap keputusan itu, Stone World mengemukakan bahawa, antara lain: (i) mahkamah adalah functus officio selepas menyampaikan penghakiman awal dan tidak mempunyai kuasa untuk mengubah syaratnya selepas itu; Engareh sepatutnya merayu terhadap penghakiman awal itu jika ia ingin mengubah syaratnya atau memulakan prosiding pelaksanaan terhadap Stone World; (ii) selain functus officio, permohonan untuk mencabar juga telah dibuat bergantung kepada s 44 Akta

Keterangan 1950 yang tidak perlu menunjukkan sebarang pelanggaran peruntukan statutori substantif; dan (iii) res judicata dan isu estoppel tidak dapat digunakan untuk mengalahkan tuduhan bahawa mahkamah tidak mempunyai bidang kuasa untuk memberikan perintah berbangkit itu. Sebaliknya, Engareh telah berhujah bahawa, antara lain: (1) perintah berbangkit diberikan dalam menjalankan bidang kuasa dan budi bicara mahkamah yang sedia ada di bawah A 92 k 4 untuk meremedikan ketidakadilan yang disebabkan oleh Stone World kepada Engareh disebabkan keengganan untuk memulangkan batu tersebut agar mematuhi penghakiman awal dan perintah mahkamah itu; (2) jika Stone World benar-benar terkilan dengan perintah berbangkit itu, ia sepatutnya meminta kebenaran untuk membuat rayuan ke Mahkamah Persekutuan terhadap pengesahan perintah tersebut oleh MR, tetapi ia tidak berbuat sedemikian.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Kuasa sedia ada mahkamah adalah kuasa bakian dan terpelihara, berasingan dan berbeza daripada kuasa statutorinya, yang mana mahkamah bebas untuk laksanakan bagi mencapai keadilan atau menghalang penyalahgunaan proses mahkamah. Akibat keengganan Stone World untuk memulangkan batu tersebut, nilai asalnya sebagaimana dijangkakan apabila penghakiman awal dibuat telah banyak berkurangan atau batu tersebut telah menjadi benar-benar tidak bernilai. Ia tidak adil kepada Engareh kerana penghakiman awal yang memerintahkan Stone World menghantar batu tersebut dalam tempoh 14 hari telah menjadi tidak berkesan dan hanya sekadar suatu penghakiman atas kertas sahaja. Penahanan batu tersebut oleh Stone World bertentangan dengan prinsip undang-undang, ekuiti dan keadilan. Ia menunjukkan pengabaian hak Engareh yang jelas dan menafikan penghakiman awal itu. Berdasarkan keadaan dan alasan sedemikian Mahkamah Tinggi telah menggunakan kuasa/bidang kuasa yang sedia ada untuk memberikan perintah berbangkit bagi memberi kesan kepada penghakiman awal itu dan melakukan keadilan kepada Engareh. Tidak ada kesilapan yang boleh dirayu dalam keputusan Mahkamah Tinggi untuk membuat perintah berbangkit itu (lihat perenggan 61, 63 & 68–69).

(2) Sama ada atau tidak untuk memberikan perintah berbangkit adalah suatu perkara dalam pelaksanaan budi bicara Mahkamah Tinggi untuk melakukan keadilan kepada pihak-pihak dan memberi kesan kepada penghakiman awal itu. Oleh demikian, pemberian perintah tersebut tidak merupakan kelainan atau perubahan penghakiman awal itu; malah, ia adalah untuk 'work out' penghakiman awal itu agar memberi kesan yang sama. Inti pati penghakiman awal itu masih dipelihara dan dikekalkan dan mahkamah itu bukan functus officio. Perintah

berbangkit itu telah disahkan secara sebulat suara oleh MR atas rayuan Stone World. Permohonan Stone World kepada mahkamah ini dalam rayuan ini adalah pada dasarnya untuk mengkaji semula keputusannya sendiri yang dalam keadaan tersebut tidak mungkin dilakukan oleh undang-undang (lihat perenggan 72, 74 & 77).

(3) Mahkamah Tinggi tidak terkhilaf kerana mendapati res judicata dan isu estoppel terpakai demi kepentingan keadilan yang memihak kepada Engareh. Jelas sekali, permohonan untuk mencabar perintah berbangkit itu adalah cubaan pintu belakang oleh Stone World untuk membuka semula pertikaian yang telah ditentukan sepenuhnya sehingga akhirnya di Mahkamah Rayuan dan tidak ada lagi yang perlu dibicarakan. Prosiding pencabaran adalah suatu penyalahgunaan proses mahkamah. Empat tahun dan tiga bulan telah berlalu antara tarikh penghakiman awal dan tarikh perintah berbangkit tersebut dan selepas itu hampir tiga tahun berlalu sebelum permohonan untuk mencabar perintah berbangkit telah dibuat. Pada masa itu, bahan-bahan dalam milikan Stone World telah kurang kualitinya dan mudah pecah dan nilainya telah berkurangan disebabkan cuaca. Berdasarkan keengganan berterusan Stone World untuk mematuhi penghakiman awal, perintah penjelasan, perintah berbangkit dan perintah taksiran, Stone World tidak boleh dibenarkan untuk melitigasi semula perkara yang berpremis di bawah nama prosiding pencabaran. Ini adalah satu kes di mana keputusan dalam litigasi perlu dikekalkan. Stone World mempunyai manfaat, dan pada hakikatnya, melaksanakan semua peluang untuk mendapatkan semua fakta dan/atau undang-undang yang dianggap relevan untuk dikemukakan di hadapan mahkamah perbicaraan, mahkamah penggulungan dan mahkamah rayuan (lihat perenggan 104–105 & 107).

(4) Mahkamah Tinggi tidak terkhilaf dalam memutuskan bahawa permohonan Stone World untuk mencabar perintah berbangkit itu atas alasan tiada bidang kuasa telah gagal kerana ia tidak dapat menunjukkan bahawa perintah tersebut telah dibuat dengan melanggar peruntukan statutori substantif sebagaimana dinyatakan dalam kes-kes *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 dan *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1. Dalam konteks itu, Mahkamah Tinggi adalah betul kerana mendapati bahawa s 44 Akta Keterangan 1950 tiada relevan dengan kes ini kerana ia bukan peruntukan substantif yang betul-betul. Sama ada permohonan untuk mencabar telah difailkan di bawah s 44 atau sama ada ia membuktikan ketiadaan bidang kuasa mahkamah, apa yang perlu dibuktikan adalah tiada yang kurang daripada peruntukan statutori substantif dalam membuat perintah berbangkit itu (lihat perenggan 86–87 & 96).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (distd)
CCI Technology Sdn Bhd & Ors v Pernec Ebiz Sdn Bhd [2016] 2 CLJ 379, CA (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
Connelly v Director of Public Prosecutions [1964] AC 1254, HL (refd)
Dceil Imex Sdn Bhd v Pembinaan Punca Cergas Sdn Bhd [2014] 8 MLJ 51, HC (refd)
Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener) [2011] 4 MLJ 173; [2011] 2 AMR 281, CA (refd)
Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175, FC (refd)
Government of India v Petrocon India Ltd [2016] 3 MLJ 435, FC (refd)
Greenhalgh v Mallard [1947] 2 All ER 255, CA (refd)
Henderson v Henderson [1843] 3 Hare 100 (refd)
Lua & Mansor (suing as a firm) v Tan Ah Kim [2017] 3 MLJ 371; [2017] 2 CLJ 175, CA (refd)
Mui Bank Bhd v Cheam Kim Yu (Beh Sai Ming, intervener) [1992] 2 MLJ 642, SC (refd)
Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor [1982] 2 MLJ 165, FC (refd)
Power Root (M) Sdn Bhd v Director General of Customs [2014] 2 MLJ 271
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181, FC (folld)
Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479; [2000] 1 CLJ 553, CA (refd)
Wee Soon Kim Anthony v The Law Society of Singapore Civil Appeal No 6000 of 2001 (unreported) (refd)
Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal [2017] 1 MLJ 301, FC (refd)

Legislation referred to

Arbitration Act 2005 s 18(8)
Companies Act 2016 s 465
Evidence Act 1950 ss 40, 41, 42, 44
Limitation Act 1953 s 30(5)
Rules of Court 2012 O 18 r 19, O 37 r 4, O 45 r 4, O 92 r 4

Appeal from: Originating Summons No WA-24NCVC-1237–06 of 2018 (High Court, Kuala Lumpur)

Robert Low (Ahmad Shahrizal and Khong Mei Yan with him) (Ranjit Ooi & Robert Low) for the appellant.

Terence KM Chan (Bryan Goh with him) (Lim Kian Leong & Co) for the respondent.

Zabariah Mohd Yusof JCA:

[1] The appeal before us was by the appellant against the decision of the learned High Court judge dated 4 October 2018 dismissing the originating summons ('OS') wherein the appellant sought to set aside:

(a) the consequential order of the High Court dated 16 October 2015 in KL Suit No S-22NCvC-85 of 2010 ('Suit 85');

(b) the deputy registrar's order for assessment of damages of RM3,735,232.97 dated 7 August 2017 in favour of the respondent; and

(c) the order of the High Court dated 25 January 2018 in dismissing the appeal of the appellant to the judge in chambers against the deputy registrar's order dated 7 August 2017,

on grounds that the High Court in Suit 85 did not have the jurisdiction to grant the consequential order.

[2] After considering the written and oral submissions by parties, we unanimously found that there was no appealable error in the decision of the learned High Court judge in dismissing the OS. We dismissed the appeal with costs and affirmed the order of the learned High Court judge dated 4 October 2018. Herein below are our grounds for deciding so.

[3] In this judgment we shall refer to the appellant as 'Stone World' and the respondent as 'Engareh'.

BACKGROUND

[4] Engareh is in the business of importing and processing marble and granite stones sourced from China, Italy, Oman and Spain. From mid-2006, Engareh began supplying these stones to dealers and wholesalers in the construction industry.

[5] On or around 2008, Engareh engaged Stone World to carry out works in cutting and/or processing marble and/or granite stones which were provided by Engareh.

[6] When business relationship between the two parties soured, Engareh instituted proceedings against Stone World on 29 October 2010 vide Suit 85 claiming for the return of certain marble and granite stones. Stone World counterclaimed against Engareh for the sum of RM268,496.54, allegedly for processing and transportation services provided by Stone World to Engareh.

[7] After a full trial, on 28 July 2011, the High Court allowed Engareh's claim against Stone World. Stone World's counterclaim was allowed based on *quantum meruit*. Damages were ordered to be assessed in favour of Engareh and Stone World respectively. We reproduced the relevant part of the said court's order/judgment herein below:

> (a) Defendan diperintahkan untuk menghantar bahan-bahan yang dibutirkan dalam perenggan 24 pernyataan tuntutan dan Apendix 1–4 (yang mana butir-butirnya dilampirkan sebagai Lampiran 1) dalam masa 14 hari dari tarikh perintah, atau dalam alternatif, perintah bahawa plaintif atau wakil-wakil plaintif dibenarkan untuk memungut bahan-bahan tersebut daripada premis defendan di PLO 466, Jalan Gangsa, Pasir Gudang Industrial Estate, 81700 Pasir Gudang, Johor, Malaysia;
>
> (b) gantirugi untuk kehilangan penggunaan bahan-bahan tersebut daripada 21 Ogos 2010 sehingga hari pengembalian kesemua bahan yang dibutirkan dalam Apendix 1–Appendix 4 untuk ditaksirkan;
>
> (c) perintah untuk pembayaran gantirugi untuk penahanan dan/atau salah guna bahan-bahan tersebut yang dibutirkan dalam Apendix 1–4, dan untuk kerugian tersebut ditaksirkan ...

We will refer to this judgment of the High Court dated 28 July 2011 as 'the initial judgment'.

[8] Subsequently, a clarification order in respect of the initial judgment was sought by parties, and on 16 July 2013, the High Court clarified the judgment and directed, inter alia, that:

> MAKA ADALAH DIPERINTAHKAN bahawa Perenggan (a) Penghakiman bertarikh 28hb Julai 2011 dipinda iaitu Defendan menghantar bahan-bahan yang dibutirkan dalam perenggan 24 Pernyataan Tuntutan dan Appendix 1–4 (yang mana butir-butirnya dilampirkan sebagai Lampiran 1) kepada Plaintif dalam masa 30 hari dari tarikh pembekalan satu alamat penghantaran di negeri Johor oleh pihak Plaintif melalui peguamcaranya.

('the clarification order'.)

[9] On 19 December 2013, Engareh provided the notification of address for delivery up of the materials pursuant to the initial judgment and the clarification order but Stone World refused/did not comply with the clarification order to deliver the materials to Engareh.

[10] Consequent to Stone World's refusal to comply with the clarification order, the learned High Court judge granted Engareh's application for a consequential order dated 16 October 2015 to assess damages for the loss of the value of the materials upon the following terms:

> (a) satu perintah berbangkit ('consequential order') untuk mengarahkan pendaftar mahkamah mentaksirkan gantirugi untuk kehilangan nilai bahan-bahan tersebut seperti yang dinyatakan dalam Lampiran 1 penghakiman bertarikh 28 Julai 2011;

('the consequential order'.)

[11] Stone World appealed to the Court of Appeal against the consequential order, which was dismissed on 18 August 2016.

[12] On 23 August 2016, both parties filed their respective notices of assessment in Suit 85 to have the damages assessed. Trial of the assessment proceedings in Kuala Lumpur High Court were conducted before the learned deputy registrar and on 7 August 2017 she awarded:

(a) RM3,735,232.97 for Engareh's claim; and

(b) RM10,000 as nominal damages for Stone World's counterclaim.

[13] On 17 August 2017 Stone World appealed against the decision of the learned deputy registrar dated 7 August 2017 to the judge in chambers.

[14] In the mean time, on 6 September 2017, Engareh served a winding up notice pursuant to s 465 of the Companies Act 2016 on Stone World on the assessed amount.

[15] On 10 October 2017, Engareh presented a winding up petition in KL High Court against Stone World.

[16] On 25 January 2018, the learned High Court judge dismissed the appeal by Stone World against the learned deputy registrar's assessment of damages.

[17] On 6 February 2018, Stone World filed two appeals to the Court of Appeal appealing against the assessment of:

(a) RM3,735,232.97 under Appeal No W-02(IM)(NCVC)-492 of 2018 ('Appeal 492') in respect of Engareh's award; and

(b) RM10,000 under Appeal No W-02(IM)(NCVC)-491 of 2018 ('Appeal 491') in respect of Stone World's award.

[18] On 7 February 2018, Stone World applied to strike out Engareh's winding up petition in the Kuala Lumpur Winding Up Court which was dismissed on 2 March 2018 by the High Court.

[19] On 14 March 2018, Engareh and Stone World entered into a consent order before the Winding Up Court to deposit the judgment sum and interest in a stakeholder's account pending the outcome of Appeal No 492 as may be decided by the Court of Appeal. Appeal No 491 against the order for nominal damages of RM10,000 was withdrawn by Stone World on 2 July 2018.

[20] On 28 June 2018, Stone World filed an OS applying to impeach the consequential order of the learned High Court judge, the learned deputy registrar's order for RM3,735,232.97 and the order of the learned High Court judge dismissing Stone World's appeal against the learned deputy registrar's order on grounds that the High Court in Suit 85 did not have the jurisdiction to grant the consequential order. We will refer to the application to impeach the initial judgment as 'the impeachment proceedings'.

[21] On 4 October 2018, the learned High Court judge dismissed Stone World's OS for impeachment of the 2015 consequential order.

[22] On 12 October 2018, Stone World filed a notice of appeal against the order of the learned High Court judge in dismissing the originating summons, which is the appeal before us.

The findings of the learned High Court judge in the impeachment proceedings

[23] The dismissal by the learned High Court judge of the OS in the impeachment proceedings was premised on the following grounds:

(a) the High Court was empowered to grant the consequential order under its inherent powers of O 92 r 4 of the Rules of Court 2012 ('the ROC');

(b) Stone World never raised the issue of the High Court's want of jurisdiction to grant the consequential order in opposing the application by Engareh in any of the proceedings in the High Court nor the Court of Appeal;

(c) premised on *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 ('Badiaddin') and *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 6 CLJ 673 ('Serac Asia'), it is incumbent on Stone World to show that the grant of the consequential order was in breach of statutory provisions. In our case, Stone World failed to do so; and

(d) the principles of res judicata applied in the interest of justice in favour of Engareh and the wider principles of issue estoppel also applied in this case.

Submission by Stone World

[24] Stone World's basis of application to impeach the consequential order is two fold, namely:

(i) it is pursuant to the court's inherent jurisdiction as set out in *Badiaddin*, where impeachment lie in instances where the order/judgment sought to be impugned was granted for want of jurisdiction, illegal or in breach of natural justice. These instances are disjunctive. In Stone World's case, the basis for the application to impeach the consequential order was that it was granted for want of jurisdiction; and

(ii) it is pursuant to s 44 of the Evidence Act 1950. Impeachment may lie where the order/judgment sought to be impugned was delivered by a court not competent to deliver it or was obtained by fraud or collusion. The words 'not competent' in s 44 means not having jurisdiction.

[25] Stone World had instituted the application for impeachment of the Consequential Order by way of a fresh action, which was in accord with the pronouncement by the Apex Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 ('Seruan Gemilang') and *Badiaddin*.

[26] Stone World's claim against Engareh was for detinue. Based on the Federal Court case of *Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor* [1982] 2 MLJ 165 ('PKNS'), the likely judgment in detinue actions may result in one of these three different forms, namely:

(a) for the value of chattel as assessed and damages for its detention; or

(b) return of the chattel or recovery of its value as assessed and damages for its detention; or

(c) return of the chattel and damages for its detention.

These three different forms of order are mutually exclusive. In our present case, the initial judgment was granted in the third form. Hence, Stone World submitted that the first appealable error by the learned High Court judge was in granting the consequential order which was granted for want of jurisdiction for the following reasons:

(a) the consequential order was granted to replace para (a) of the initial judgment as amended pursuant to the clarification order; and

(b) through the consequential order, para (a) of the initial judgment was effectively varied or changed. In effect, Engareh had varied or revised the initial judgment to the first form of the three forms. Engareh should have appealed against the initial judgment if Engareh wished to have the judgment in the other forms.

[27] In the event Engareh contended that the goods in question were not delivered as per the initial judgment, then Engareh's remedy lies elsewhere, namely execution proceedings, not via consequential orders.

[28] It is trite principle of law that a court is *functus officio* once it has delivered its judgment/order. The court is not empowered to vary or change its regularly obtained judgment or order. The exceptions where courts may issue consequential orders is only limited to 'working out' the orders so as to give effect to the initial orders.

[29] It was submitted by Stone World that the consequential order granted by the High Court does not fall within this exception of 'working out' the initial judgment, but was in effect varying it.

[30] The learned High Court judge erred in failing to distinguish the facts in the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181 ('Takako Sakao') with our present case. The claim in *Takako Sakao* was in trust and the relief was premised upon equitable principles. The claim by Engareh is one premised upon common law. The consequential order in *Takako Sakao* was not a variation of the initial judgment unlike Engareh's case (the purported first appealable error).

[31] Stone World submitted that the second appealable error on the part of the the learned High Court judge was when Her Ladyship premised her findings on *Badiaddin*'s case, namely, that Stone World failed to show any contravention of statutory provisions. Stone World's case on want of jurisdiction was never premised on contravention of any statutory provisions. It was based on the contention that the High Court in granting the consequential order was already *functus officio*. Therefore, there is no necessity to show that the consequential order was granted in contravention of any statutory provision.

[32] Alternatively, it was argued that Stone World's impeachment proceedings was premised on s 44 of the Evidence Act 1950. It is provided under this section that want of jurisdiction per se is sufficient ground to impeach a judgment/order with no necessity to show a breach of any statutory provision. The learned High Court judge failed to address and make the necessary findings in relation to s 44 of the Evidence Act 1950.

[33] The third appealable error is where the learned High Court judge held that the doctrine of res judicata applied in the interest of justice in favor of Engareh, as the issue of jurisdiction was not expressly raised or taken by Stone World in the High Court and also in the hearing of the appeal in the Court of Appeal in relation to the consequential order.

[34] Stone World submitted that res judicata has no application in favor of Engareh as a decision of a court not clothed with the necessary jurisdiction would not give rise to res judicata (refer to the Federal Court case of *Government of India v Petrocon India Ltd* [2016] 3 MLJ 435 ('Government of India') at p 456 para 49).

[35] The fourth appealable error is the findings of the learned High Court judge that the doctrine and principles of issue estoppel should apply in the interest of justice in favour of Engareh. The learned High Court judge held that Stone World should have and could have raised the issue of want of jurisdiction previously.

[36] It was submitted that the wider issue of estoppel had no application if the consequential order was granted for want of jurisdiction or has no jurisdiction to grant the initial judgment in the first place. Where the court lacks the jurisdiction to grant an order, the issue of consent or estoppel is irrelevant as it can never confer jurisdiction upon such court, when it does not have jurisdiction in the first place.

[37] Couched as the fifth appealable error, it was submitted that the learned High Court judge appeared to be swayed by the conduct of Stone World in defying the order of the High Court. Stone World submitted that Engareh could not remedy a wrong with another wrong. As the consequential order was granted for want of jurisdiction, there is no remedy available. As such, the learned High Court judge relied on irrelevant considerations.

[38] Hence the consequential order ought to be set aside pursuant to the principles as set out in *Badiaddin* and/or s 44 of the Evidence Act 1950.

Submissions by Engareh

[39] Stone World did not raise the issue of jurisdiction of the High Court in granting the consequential order. Stone World's opposition to the consequential order in Suit 85 at that time was that 'it had made the necessary arrangements for the delivery of the goods but Engareh did not keep to the arrangements (as agreed beforehand)'.

[40] There was no allegation by Stone World at the hearing of the

consequential order that the High Court had no jurisdiction to grant the consequential order or that the consequential order was in effect a variation to and/or alteration to and/or substitution of para (a) of the initial judgment.

[41] In Stone World's affidavit in opposing the grant of the consequential order in Suit 85, it states as follows:

> I refer to paragraph 16 of the said Plaintiff's affidavit and verily state that although this Honorable Court has ample jurisdiction to make consequential orders, nevertheless a direction for an assessment of damages of loss of the value of the said materials which is still in the Defendant's warehouse would only cause injustice to the Defendant.

[42] During the hearing of the appeal against the consequential order in the Court of Appeal, Stone World did not raise in the memorandum of appeal as to the lack of jurisdiction of the court in granting the said order and neither was it ever raised in the hearing of the said appeal. Neither was there any application to seek for leave as an attempt to further appeal to the Federal Court.

[43] Stone World also did not raise the issue of jurisdiction of the High Court at the hearing of the winding up petition as a ground to challenge the consequential order.

[44] The OS for the impeachment of the consequential order was only filed and/or raised after the following proceedings were exhausted:

(a) the consequential order was granted by the High Court on 16 October 2015;

(b) the unanimous dismissal by the Court of Appeal of Stone World's appeal against the consequential order on 18 August 2016;

(c) the hearings leading to the learned deputy registrar's assessment of damages;

(d) the appeals to the judge in chambers against the learned deputy registrar's assessment of damages;

(e) the winding up petition; and

(f) the hearing of Stone World's motion to strike out the winding up petition.

[45] Engareh contended that the consequential order was in fact not a variation or replacement or change of the initial judgment and/or the clarification order. The High Court had the jurisdiction to grant the consequential order.

[46] To set aside the consequential order, Stone World must show that there was illegality or lack of jurisdiction or breach of natural justice. The inherent and discretionary jurisdiction contemplated in *Badiaddin* should not be applied if the failure on the part of the plaintiff was a defect which had merely contravened a procedural requirement. This was echoed in *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479; [2000] 1 CLJ 553 ('Tenaga Nasional Bhd') where *Badiaddin* was referred to.

[47] The learned High Court judge was not in error when Her Ladyship found that Stone World failed to show the consequential order was granted in contravention of any statute and therefore the *Badiaddin*'s challenge failed. The present appeal falls outside *Badiaddin*'s test. The consequential order was not one which defies a substantive statutory provision.

[48] It was submitted by Engareh that there is certainly no infringement of any written law and even more certain, nothing prohibitive, statutory or otherwise, in the manner the High Court in Suit 85 exercised the discretion to grant the consequential order, which was to remedy an injustice brought by the refusal by Stone World to abide by the judgment as handed down by the court.

[49] Stone World should and could have raised the argument of enforcement under O 45 r 4 of the ROC in the consequential order, which they did not, and that even in the appeal to the Court of Appeal they failed to pursue this point. Hence Stone World cannot re-litigate this point now under the guise of impeachment proceedings.

[50] The granting of the consequential order involved the exercise of discretion under O 92 r 4 of the ROC. The High Court in Suit 85 had dealt with this issue in its judgment in 2015. Stone World had appealed against this exercise of discretion and the Court of Appeal had affirmed it in 2016. To complain subsequently by an impeachment proceedings, that the High Court in Suit 85 should not had exercised that discretion in granting the consequential order as it is a variation or substitution of the initial judgment and/or the clarification order, now is too late in the day as this complaint ought to have been raised in Suit 85, and not by an impeachment proceedings.

[51] If indeed Stone World was aggrieved by the decision of the High Court and the Court of Appeal, they ought to have applied for leave to appeal to the Federal Court which they did not.

[52] If this court is to endorse the proposition by Stone World, there is bound to be flood gates of litigants holding back their arguments in installments and only to come to the court six years later to argue that the court

in granting the consequential order has no jurisdiction, despite every opportunity was available earlier to raise it as an issue for the court's determination.

OUR FINDINGS

Whether the High Court has the power to grant the consequential order

[53] The nub of the appeal before us is on the issue of whether the High Court was empowered to grant the consequential order.

[54] The learned High Court judge in her grounds had examined the basis of Engareh's notice of application when seeking for the consequential order. It was made pursuant to O 37 r 4 and/or O 92 r 4 of the ROC. For ease of reference, we reproduced O 37 r 4 and O 92 r 4 herein below:

Order 37 r 4 of the ROC:

> The Court may, in the case of any such judgment as is mentioned in rule 1, order either —
>
> (a) that the assessment of the damages shall be made by the Registrar; or
>
> (b) that the action shall proceed to trial before a Judge in respect of the damages,
>
> and where the Court orders that the action shall proceed to trial, Order 34 shall apply with the necessary modifications.

Order 92 r 4 of the ROC:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[55] The learned High Court judge considered the reasons for the said application as laid out in the affidavit in support of the said application by Engareh, namely, it was necessitated by Stone World's continuous refusal to comply with the terms of the initial judgment and/or clarification order for the delivery of the said materials. Her Ladyship also considered the basis of the challenge by Stone World, which is, that the warehouse address given by Engareh's solicitors refers to a piece of land for phase by phase development and there was in fact no warehouse, and that on the date which was agreed for the collection of the said materials, there was no one from Engareh or their representative were present at the given address to do the collection of the same.

[56] Her Ladyship also noted the reply by Stone World in its affidavit in reply opposing the application by Engareh for the consequential order, which averred the following:

> 7. I refer to paragraph 16 of the said Plaintiff's affidavit and verily state that although this *Honourable Court has ample jurisdiction to make consequential orders*, nevertheless a direction for an assessment of damages of loss of the value of the said materials which is still in the Defendant's warehouse would only cause injustice to the Defendant.
>
> 8. I am advised by the Defendant's solicitors and verily believe that until the Plaintiff has not collected or taken steps to collect the said materials (stones), Plaintiff cannot proceed with assessment of damages. (Emphasis added.)

This reply by Stone World is pertinent, as the learned High Court judge found that by these averments by Stone World (at the point of the notice of application by Engareh for the consequential order), it had specifically and expressly acknowledged that the High Court had ample jurisdiction to grant the consequential order.

[57] The learned High Court judge had also considered the submissions by Engareh at the point of seeking for the consequential order, on the application of O 92 r 4 of the ROC in doing justice to Engareh which had long been deprived of the fruits of litigation, that is, the return of the said materials pursuant to the initial judgment. It was also specifically stated in the grounds of judgment of the learned High Court judge that the act of Stone World in retaining the said materials had resulted in the deterioration of the same due to weathering. Given the aforesaid, Engareh was left with no option but to approach the courts seeking for orders for the assessment of damages for the loss of the value of the said materials apart from the assessment of damages and/or losses granted to Engareh by virtue of the initial judgment and clarification order. In coming to such conclusion, Her Ladyship had referred to the reasoning by the learned Justice Nor Bee (the learned judge who had granted the consequential order) where Her Ladyship invoked the inherent jurisdiction of the court in granting the consequential order, in order to give effect to the initial judgment. It is to be noted that both Stone World and Engareh:

(a) filed the relevant notices for the assessment of damages before the learned deputy registrar; and

(b) had participated in the hearing of the assessment of damages before the learned deputy registrar,

pursuant to the consequential order/clarification order and this court had dismissed the appeal by Stone World in respect of the learned deputy registrar's decision in awarding damages.

[58] After giving due consideration to the aforesaid, the learned High Court judge made her findings at para 53 of her grounds of judgment that the High Court was empowered to grant the consequential order as the Court of Appeal had affirmed the decision of the High Court in granting the consequential order. It was Her Ladyship's findings that the consequential order was granted in the interest of justice to Engareh who was 'faced with an opponent bent on defying whatever judgment and/or order pronounced by the court'.

[59] In the process of making her findings, the learned High Court judge referred to the Federal Court case of *Takako Sakao*. This, according to the counsel for Stone World, was the first appealable error committed by the learned High Court judge. It was submitted that Her Ladyship failed to distinguish the facts in the Federal Court case of *Takako Sakao* with our present case. It was submitted by Stone World that the consequential order in *Takako Sakao* was not a variation of the initial judgment unlike Engareh's case.

[60] We, however disagreed with the submission by learned counsel for Stone World in this respect. Although *Takako Sakao* involved a constructive trust issue, what is pertinent is the principle derived from the said case pertaining to the court in invoking its inherent power to do justice to parties due to the turn of events which had left the appellant bereft of any effective remedy despite an initial judgment granted by the court. It is pertinent to look at the facts of *Takako Sakao* to appreciate why the court there granted the consequential order the way it did, and from there it is clear that the same is applicable to Engareh's case. We refer specifically to the relevant part of the judgment:

At p 184:

> (1) ... It emerged, undisputed, that the second, respondent had sold the subject property to a third party ... To prevent any further fraud and for the purpose of preserving the subject property ... we directed the Registrar of Titles to enter his caveat ... It is settled that this court has ample jurisdiction to make consequential orders to give effect to its judgment (see *Tan Soo Bing & Ors v Tan Kooi Fook* [1996] 3 MLJ 547) including directing the entry of a registrar's caveat (see *Seet Soh Ngoh v Venkateswara Sdn Bhd & Anor* [1976] 1 MLJ 242) and to ensure that its judgment in particular cases is not defeated by intervening events.
>
> ...
>
> [5] In the present case, the appellant and the first respondent as partners, that is to say, as joint venturers, agreed to embark on a joint venture which involved the acquisition of the subject property for the purposes of partnership, that is to say, the joint venture, and the first respondent with the agreement of the appellant, her co-joint venturer, who believed her to be acting for their joint purposes, acquired the property in her name but subsequently sought to retain the land for her own benefit. Hence, this court regarded her as constructive trustee. And in the

> circumstances of the present case, the just and equitable remedy would have been to sell the subject property and to have the net proceeds divided equally between the parties. *However, subsequent events have made this impossible as the second respondent who though bound by the constructive trust has unilaterally sold off the subject property and pocketed the purchase price. The property has gone into the hands of a person who is not alleged to have acquired it with notice of the trust in the appellant's favour. So it cannot now be regained in specie and restitutio in integrum decreed. Does this mean that the appellant is bereft of any remedy? We do not think so.* We do not think that the second respondent should be allowed to thumb its nose at our judgment.
>
> [6] In our considered opinion, the effective remedy is to direct the second respondent to pay the appellant's solicitors (since she is a foreigner and not in Malaysia) the sum of RM1.9 million representing one-half of the purchase price ...

[61] The principle to be distilled from *Takako Sakao* is very much relevant to our present case, namely the occurrence of intervening events after the initial judgment was given. The learned High Court judge found there were intervening events in our present case and these 'were largely attributable by Stone World's own conduct such that even if the said materials had been delivered to Engareh, the original value of the said materials as contemplated at the end of the trial which led to the order for delivery-up of the said materials within 14 days of the initial judgment had been greatly diminished or otherwise rendered completely worthless'. This would cause an injustice to Engareh as the initial judgment would serve no purpose but a mere paper judgment. It was under such circumstances and reasoning that the learned High Court judge found that the court was empowered to invoke its inherent powers to grant consequential orders and the decision of the High Court had been affirmed by this court.

[62] It is to be noted that O 92 r 4 of the ROC is merely a declaratory provision which declares that the Rules do not limit or affect the inherent powers of the High Court. A reminder of the existence of such inherent power was further provided under r 4. These inherent powers of the court are intrinsic to a superior court in order to facilitate the proper functioning of it as a court of law. 'There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such limited jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.' (*Connelly v Director of Public Prosecutions* [1964] AC 1254 at p 1301).

[63] Inherent powers of the court are separate and distinct source of jurisdiction from statutory powers of the court. They are residuary and reserve source of power. The inherent powers of the court are in addition to the powers specifically conferred by the rules on the court. They are complementary to those powers. The court is free to exercise them towards the ends of justice or

to prevent the abuse of the process of the court. Thus it can be exercised cumulatively and concurrently with other sources of power. It is part of procedural law, not substantive law. It is invoked in relation to the process of litigation (see *Halsbury Laws of England* (95th Ed, Vol 11, 2015), para 23). Their application depend on the circumstances of the case. The significance of the doctrine of inherent jurisdiction lay in its flexibility, for the court can extend it to any instance which requires its intervention in the absence of precise statutory regulation, or where injustice or abuse might otherwise result. It should be exercised judiciously and should not be circumscribed by rigid criteria or tests (*Wee Soon Kim Anthony v The Law Society of Singapore* Civil Appeal No 6000 of 2001 (unreported) ('Wee Soon Kim Anthony'). It must not be applied indiscriminately (see *Malaysian Civil Procedure* (2018) Vol 1 p 1246).

[64] Coming back to our present case, apart from relying on *Takako Sakao*, the learned High Court judge in the impeachment proceedings also relied on *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener)* [2011] 4 MLJ 173; [2011] 2 AMR 281 ('Ezzen Heights') and *Power Root (M) Sdn Bhd v Director General of Customs* [2014] 2 MLJ 271 ('Power Root').

[65] In *Ezzen Heights*, the court had invoked its inherent powers in the interest of justice or to prevent an abuse of the court's process. There, the plaintiff and the defendant entered into a joint venture agreement ('the JVA') to develop the plaintiff's land into 12 lots of four storey shop-offices, out of which the plaintiff was entitled to four lots and the defendant, the remaining eight lots. The JVA was executed by the former directors of the plaintiff pursuant to a resolution. An irrevocable power of attorney ('the IPA') was prepared pursuant to cl 5(xv) of the JVA. The IPA was executed by the authorised directors according to their resolution, attested by the plaintiff's own solicitors and forwarded to the defendant's solicitors. On the completion date, the plaintiff took possession of its lots and subsequently declared that the JVA has been terminated. The defendant challenged the purported termination. The plaintiff then filed an originating summons ('OS') seeking, inter alia, to declare the JVA and the IPA null and void. Before the trial court could deliver the eight judgments, the plaintiff had purportedly sold the defendant's lots to a third party, the intervener. The plaintiff's OS was dismissed by the High Court. The plaintiff's appeal was also dismissed by this court. But what is pertinent is apart from dismissing the appeal by the plaintiff, this court held that the facts and circumstances of the case attract the application of O 92 r 4 of the ROC to prevent injustice to parties. The defendant therein was granted a consequential relief to remove the intervener's private caveat, to restrain the plaintiff and the intervener from dealing with the defendant's lots and for the plaintiff and the intervener to deliver the defendant's lots to the defendant.

[66] In *Power Root*, which is a decision by the High Court, the company, Power Root (M) Sdn Bhd ('the company'), had earlier paid to the respondent the sales tax on manufacturing of certain drinks at the rate of 10% in view of the respondent's decision. The company appealed to the Customs Appeal Tribunal which dismissed the company's appeal. They appealed to the High Court which allowed their appeal. The Court of Appeal dismissed the respondent's appeal against the High Court's decision which means that the sales tax ought to be paid by the company was only 5%. The company then made a claim for the refund of the 5% sales tax which had earlier been paid to the respondent. However, the claim was refused on grounds that there was no court order directing the refund to be made. The company then filed encl 20 for consequential reliefs to give effect to the orders made by the High Court and the Court of Appeal. The High Court had invoked O 92 r 4 to make the consequential orders to prevent injustice. It was also held that the court was not *functus officio* and that for the respondent to retain the additional 5% sales tax would create injustice to the company and allowed the company's application by granting consequential relief to give full effect to the orders made by the High Court and Court of Appeal, that is, to order the return of the 5% sales tax in light of the decision of the Court of Appeal that the respondent erred in imposing a tax rate of 10% instead of 5%. It was held that the respondent had no right to retain illegally collected taxes and the company should have recourse to restitution as of right. In its judgment, the High Court referred to and followed *Ezzen Heights*.

[67] The application of this inherent power of the court under O 92 r 4 can be seen in a more recent case of this court in *CCI Technology Sdn Bhd & Ors v Pernec Ebiz Sdn Bhd* [2016] 2 CLJ 379 ('CCI Technology Sdn Bhd') so as 'to do complete justice between parties'.

[68] Similarly, applying the principle to the facts of our case, to allow Stone World to retain the materials which ought to have been delivered to Engareh goes against established principles of law, equity and justice. Stone World has demonstrated a clear disregard of the rights of Engareh and clear defiance of the court's initial judgment in respect of the materials. At the time of the consequential order the state of the materials was no longer in its original state and has deteriorated in value.

[69] Given the aforesaid, we did not find any appealable error in Her Ladyship's application of the principle in *Takako Sakao*, namely, that the court has ample jurisdiction in invoking its inherent jurisdiction to make consequential orders to give effect to its judgment and to do justice to Engareh due to events that had occurred which rendered the initial judgment ineffective.

[70] The basis of the application for impeachment of the consequential order by Stone World was the want of jurisdiction by the High Court when it granted the same at the point when the court was already *functus officio*. Stone World asserted that its basis for impeaching the consequential order was never premised on contravention of statutory provisions. On that basis, Stone World claimed that the learned High Court judge erred when Her Ladyship premised her findings on *Badiaddin*'s case and made her findings that Stone World failed in its impeachment application as it failed to show that the consequential order was granted in breach of any statute or law.

[71] It was alleged by Stone World that the court was wrong in law in granting the consequential order when it was already *functus officio* after granting the initial judgment. Stone World referred us to various authorities wherein consequential orders are permissible when it amounts to 'working out' of initial orders, as opposed to varying initial orders when courts are *functus officio*:

(a) the first case on point is *Mui Bank Bhd v Cheam Kim Yu (Beh Sai Ming, intervener)* [1992] 2 MLJ 642 ('Mui Bank Bhd') where the Supreme Court, at p 648, said in its judgment that:

> ... True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a *final order* unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is *functus officio* and therefore has no power to set aside the order for sale.

(b) in the case of *Dceil Imex Sdn Bhd v Pembinaan Punca Cergas Sdn Bhd* [2014] 8 MLJ 51 ('Dceil Imex'), the learned High Court judge was urged to entertain an application for exclusion of time pursuant to s 30(5) of the Limitation Act 1953. By way of the said application the respondent sought for an order that the period between 6 April 2006–13 October 2010, namely the period between the commencement of the arbitration and the date when the arbitration was declared null and void, be excluded in computing the time prescribed by the Limitation Act 1953 for the purpose of its counterclaim. The appellant objected to the application and submitted that the court was *functus officio* as of the date of handing down of the decision on 13 October 2010. In addition, the appellant submitted that s 30(5) of the Limitation Act 1953 could not be invoked in conjunction with a High Court order made pursuant to s 18(8) of the Arbitration Act 2005. In response to the appellant's argument that its application was *functus officio* the respondent contended that its application under s 30(5) of the Limitation Act 1953 was a consequential or ancillary order to that of the order of the court of 13 October 2010 allowing the appellant's appeal

A and declaring the arbitration null and void. It was held by the High Court that:

> [2] The fact that the respondent sought the present order for exclusion of time some two and half years after the order of 13 October 2010, declaring the arbitration null and void, did not render this court functus officio. The delay in itself did not alter the nature of the order sought to be obtained, especially since it fit neatly with the policy which the legislation was promulgated to achieve. It was also clear that the respondent sought relief arising as a consequence of the order of court of 13 October 2010 allowing the appellant's appeal. As such, the order sought by way of the present application was a consequential order that involved working out the order of 13 October 2010.

(c) the next authority relied by Stone World is the Federal Court case of *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal* [2017] 1 MLJ 301 ('Zen Courts Sdn Bhd') where it was held that:

> [2] The essence of the matter was the buy-out of the appellant's 30% shareholding of the first respondent company. If an application varies the essence of the agreement then the application must fall outside the ambit of 'liberty to apply'. In the circumstances, the court satisfied that the application of determining the final value of the shares under encl 80 would fall squarely within the context of the phrase 'liberty to apply' and was not variation of the consent order. In fact, it did make good commercial sense that parties be entitled to challenge any valuation, if it were to be unreasonable high or low. With regards to encl 84, the court ordered the matter be sent back to the High Court for trial before a different judge ...

[72] Our perusal of the aforesaid cases cited by Stone World show a common denominator which is this: the issue of whether or not to grant consequential order lies in the exercise of discretion by the court, namely, to do justice to parties. It is also to give effect to the initial judgment of the court. In such instances, the consequential order granted cannot amount to a variation or alteration of the initial judgment. The consequential order is to 'work out' the initial order to give effect to the same. The very essence of the initial judgment is still preserved and maintained. The courts in such instances cannot be said to be *functus officio*.

[73] When the learned Justice Nor Bee was asked to consider the consequential order application in 2015, Her Ladyship had to decide whether she was clothed with the necessary jurisdiction to grant the consequential relief sought for, by Engareh. She had considered this issue at para 11 of her grounds of judgment when she considered the cases of *Takako Sakao*, *Ezzen Heights* and *Power Root*.

[74] The Court of Appeal subsequently, upon appeal by Stone World, had found it fit not to intervene with such exercise of discretion and affirmed her decision. Now, what Stone World is inviting this court to do is essentially to review this court's own decision, which in the circumstances, is not possible in law.

[75] It is undisputed that the consequential order has gone through the appeal process where it had been unanimously affirmed by this court. It is also to be noted that the impeachment application was only filed after the following proceedings were exhausted:

(a) the consequential order was granted by the High Court on 16 October 2015;

(b) the unanimous dismissal by the Court of Appeal of Stone World's appeal against the consequential order on 18 August 2016;

(c) the hearings leading to the learned deputy registrar's assessment of damages;

(d) the appeals to the judge in chambers against the learned deputy registrar's decision on assessment of damages;

(e) the winding up petition; and

(f) the hearing of Stone World's motion to strike out the winding up petition.

Nowhere in the above proceedings was it ever raised by Stone World on the issue of want of jurisdiction of the High Court in granting the consequential order.

[76] The learned High Court judge in the impeachment proceedings and the learned Justice Nor Bee had extensively laid out the reasons as to why the consequential reliefs were granted. The learned High Court judge found that even if, at that point in time Stone World was to deliver the materials, it would not have any effect as the initial judgment was impossible to be implemented due to intervening events that had occurred. Her Ladyship in the impeachment proceedings was echoing the relevant parts of the judgment of learned Justice Nor Bee when considering whether to grant the consequential order:

> [10] Keengganan defendan untuk mematuhi kedua-dua perintah mahkamah telah lama berlarutan. Plaintif telah dinafikan hasil litigasinya untuk sekian lama. Tidak ada pertikaian bahawa bahan-bahan tersebut berada pada setiap masa yang material dalam milikan defendan. Juga tidak ada pertikaian bahawa keadaan semasa bahan-bahan tersebut semakin teruk terjejas dan mudah pecah (*fragile*) akibat kesan cuaca. Ini bermakna jika sekali pun defendan mahu menghantar serah bahan-bahan tersebut sekarang, nilai asal bahan-bahan tersebut sudah tentunya begitu merosot

atau berkemungkinan tidak langsung membawa apa-apa nilai. Keengganan berterusan defendan dan tindakannya yang dengan jelas dan nyata membelakangkan kehendak penghakiman dan perintah tersebut telah menyebabkan ketidakadilan kepada plaintif yang kehilangan manfaat daripada hasil litigasinya.

[11] Adalah undang-undang yang mantap bahawa mahkamah ini mempunyai bidang kuasa untuk memberi perintah sampingan ...

[77] In light of the aforesaid, the learned High Court judge did apply her mind in applying the principles as laid out in *Takako Sakao*, *Ezzen Heights* and also *Power Root* where it was held in the said cases that the court had ample jurisdiction to make consequential orders to give effect to its judgment. The consequential order cannot be regarded as a variation of the initial judgment as the essence of the initial judgment was still intact and the court was not *functus officio*.

Order 45 r 4 of the Rules of Court 2012

[78] It was submitted by Stone World that, in the event Engareh contended that the goods in question could not be delivered as per the initial judgment then Engareh should have pursued an action under O 45 r 4 of the ROC. For ease of reference O 45 r 4 provides as follows:

Enforcement of judgment for delivery of movable property (O 45 r 4)

4(1) Subject to these Rules, a judgment or order for the delivery of any movable property which does not give a person against whom the judgment is given or order made the alternative of paying the assessed value of the property may be enforced by one or more of the following means:

(a) a writ of delivery to recover the property without alternative provision for recovery of the assessed value thereof (which is referred to as a 'writ of specific delivery' in this rule);

(b) in a case in which rule 5 applies, an order of committal.

(2) Subject to the provisions of these Rules, a judgment or order for the delivery of any movable property or payment of their assessed value may be enforced by one or more of the following means:

(a) a writ of delivery to recover the property or its assessed value;

(b) with the leave of the Court, a writ of specific delivery;

(c) in a case in which rule 5 applies, an order of committal.

(3) A writ of specific delivery, and a writ of delivery to recover any movable property or their assessed value, may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ.

(4) A judgment or order for the payment of the assessed value of any movable property may be enforced by the same means as any other judgment or order for the payment of money.

[79] The rule provides for enforcement of a judgment or order for delivery of goods. It makes a distinction between judgment or order for delivery of goods:

(a) which does not give the defendant the option of retaining them by paying their assessed value; and

(b) which does give the defendant such an option.

In the case of judgment or order of the first form, the method of enforcement is by a writ of specific delivery. In the case of judgment or order in the second form, the method of enforcement is by writ of delivery to recover the goods or their assessed value. This rule provides an option in enforcing judgment or orders of court, but it does not restrict the court from invoking its inherent jurisdiction in granting consequential orders to do justice to parties, as the facts in the present case warrant it.

[80] Even if we are to accept counsel for Stone World's argument on this point, it still does not amount to a defiance of a substantive provision. In any event, this point was never raised by Stone World in any of the proceedings which it had participated before the filing of the Impeachment proceedings. Clearly it is an after thought devoid of any legal basis.

Whether Engareh should have appealed against the initial judgment

[81] We also found that the issue raised by Stone World that Engareh should have appealed against the initial judgment so as to have the order in other forms (as compared to the initial judgment which gave relief in the third form as the claim was in detinue as opposed to conversion) cannot be raised now as it was never raised in all the other proceedings as stated in para 75 of this judgment. In any event, the court cannot be faulted for exercising its discretion in granting the consequential order in view of the intervening events that had occurred. The fact that Stone World still retains possession of the materials is never in dispute. There was also the finding by the High Court that the materials have diminished in value due to weathering. To deny Engareh of the fruits of the initial judgment, in our view, will cause injustice to Engareh. Hence, this puts to rest the contention of Stone World that the consequential order ought to be set aside as it was granted when the court had no jurisdiction to grant such order as it was already *functus officio*.

Did the High Court err in applying the Badiaddin's test?

[82] We disagreed with learned counsel for Stone World's submission that the learned High Court judge erred when Her Ladyship premised her findings on the fact that Stone World failed to fulfil the *Badiaddin*'s test when there is no contravention of statutory provisions shown.

[83] We were of the view that counsel for Stone World had missed the point. It is trite principle of law that a court cannot alter or set aside its own order which had been perfected. However there are exceptions to this general rule. *Badiaddin* has established that impeachment of previous court orders may lie in instances where the order/judgment sought to be impugned was granted for want of jurisdiction, illegal or in breach of natural justice. The inherent and discretionary jurisdiction contemplated in *Badiaddin* should not be applied if the failure on the part of the plaintiff was a defect which had merely contravened a procedural requirement. It must be in defiance of a substantive statutory provision. This was enunciated by Mohd Azmi FCJ in the judgment of the said case where His Lordship stated at p 409 (MLJ); p 93 (CLJ), paras f–h:

> ... any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which *defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction*. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[84] A further reminder was enunciated by this court in *Tenaga Nasional Bhd* where the court held that the default judgment entered against the appellant was irregular as it was entered in breach of an express agreement between counsel and sanctioned by the court that only issue of liability was to be tried. It was also held that the default judgment was not an order made in contravention of any statutory provision, but it was a final order nonetheless. Gopal Sri Ram JCA in delivering the decision of the Court of Appeal in *Tenaga Nasional Bhd* reiterated the importance of maintaining the distinction between a final order of a court tainted by procedural irregularity and one made in contravention of statute when he said at p 488 (MLJ); p 561 (CLJ), paras f–g of the report:

> *The inherent jurisdiction in a court to set aside final orders made by it is one that must*

be exercised with much circumspection. It may be exercised in the case of an order made in contravention of an Act of Parliament. But the jurisdiction does not extend to final order that is procedurally defective and hence merely irregular. (Emphasis added.)

Further at p 488 (MLJ); p 562 (CLJ) at para c of the same case, His Lordship said:

It is of importance to note that *Badiaddin* was a case in which the plaintiff had brought a fresh action to rid himself of a final order made in contravention of the Malay Reservation Enactment (FMS Cap 142). It was therefore *an exceptional case*, as the judgments of the Federal Court in that case make it plain. We would observe that on its facts, the present appeal has none of the features that were present in *Badiaddin*'s case. At the risk of repetition, we say that this is not a case where an order had been made in defiance of a substantive statutory provision. (Emphasis added.)

[85] What is meant by 'exceptional case' in *Badiaddin* was further clarified and examined in the Federal Court case of *Serac Asia* where it was held that:

[31] It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. *Only in that exceptional case can a defective judgment be struck out ex debito justitiae*. It is thus *only* in this situation *that a High Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction*, (see *Badiaddin*'s case).

[32] The Court of Appeal in *Selvam Holding* said that besides the situation above, *Badiaddin* seemingly had 'extended the scope and extent of the inherent discretionary jurisdiction of a court' to set aside an order 'where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside'.

[33] *We have carefully re-examined Badiaddin and could not find anywhere in its ratio to say that the court's inhe re nt jurisdiction has an extended scope to correct an earlier regular judgment or order in exceptional circumstances other than where the judgment had been granted in contravention of a statute.*

...

[35] We are thus in agreement with the appellant's stand that *an earlier judgment can only be impeached when it is prohibited by statute*; and that *Badiaddin* to us *merely reaffirmed that rule and does not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition*. This established rule was explained in *Tenaga Nasional* which we had earlier adverted to. In our view, that part of the holding of the Court of Appeal in *Selvam Holdings* should not be interpreted as giving the courts a broad power to set aside a previous perfected orders under the guise of 'exceptional cases'. We think that the *Badiaddin*'s phrase 'to intervene and correct a serious defect in the order' should be read in the context of where an order was obtained in a manner which contravened a statute, resulting in

A that order being illegal or made outside the jurisdiction of the court. It is this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier order, *ex debito justitiae* and without the need to file a fresh suit. (Emphasis added.)

B **[86]** From the aforesaid, it has been established that there has not been any extension of the scope of exception whereby the inherent jurisdiction of the court to correct an earlier judgment or order as laid out in *Badiaddin*. The only exceptional case that a regularly obtained judgment of the court of co-ordinate jurisdiction that can be challenged is in cases of contravention of any substantive statutory provision. *Badiaddin* and *Serac Asia* has made it crystal C clear: to challenge any judgment of court as being null and void on grounds of illegality or lack of jurisdiction, nothing short of showing to the court that the judgment was made in defiance of a substantive statutory provision. On the facts, the OS has none of the features that were present in *Badiaddin*. Stone D World's case is not one where the consequential order had been made in blatant defiance of a substantive provision.

[87] Given the clear pronouncement in *Badiaddin* and *Serac Asia*, the learned High Court judge did not err when Her Ladyship held that it is E incumbent on Stone World to show that the grant of the consequential order was in breach of statutory provisions, which Stone World failed to do.

Section 44 of the Evidence Act 1950

F **[88]** Alternatively, it was argued by Stone World that its impeachment application was premised on s 44 of the Evidence Act 1950. Stone World submitted that this section provides that want of jurisdiction per se is sufficient ground to impeach a judgment/order with no necessity to show a breach of any statutory provision. It was also submitted that the learned High Court judge G failed to address and make the necessary findings in relation to s 44 of the Evidence Act 1950.

[89] Our perusal of the grounds of the learned High Court judge disclosed H that Her Ladyship did consider s 44 of the Evidence Act 1950 and its applicability to our current case (refer to paras 35–37 of her grounds in *RRT*).

[90] Section 44 of the Evidence Act 1950 provides as follows:

I 44 Fraud or collusion in obtaining judgment or incompetency of court may be proved.

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

Section 44 of the Evidence Act 1950 refers to ss 41 and 42 of the same which refer to relevancy of a final judgment, order or decree of a court *in the exercise of its probate, matrimonial, admiralty or bankruptcy jurisdiction*. The learned High Court judge found that ss 41 and 42 of the same are of no relevance in the determination of the impeachment proceedings, as it has got nothing to do with the court in the exercise of its probate, matrimonial, admiralty or bankruptcy jurisdiction.

[91] However she found that s 40 of the Evidence Act 1950 which is being referred to in s 44 is significant as it codifies the doctrine of res judicata. For ease of reference, s 40 of the Evidence Act 1950 states:

> 40 The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial.

Her Ladyship was not wrong there, as in the context of the impeachment proceedings in our case, the issue of *res judicata* was argued at length by both parties and the learned High Court judge had addressed *res judicata* and issue estoppel at paras 60 and 61 in her grounds of judgment.

[92] We will address s 44 of the Evidence Act 1950 in the context of s 40 as the other sections (ss 41 and 42) referred to in s 44 are of no relevance to the impeachment proceedings.

[93] Section 44 of the Evidence Act 1950 provides an exception to the doctrine of res judicata. This would mean that a party in a suit or proceeding can avoid the effect of any order or judgment of any court (although caught by res judicata) by raising and proving any of the following three grounds, namely, that the order:

(a) delivered by a court not competent to deliver it; or

(b) was obtained by fraud; or

(c) was obtained by collusion.

(Refer to FC decision in *Seruan Gemilang* at p 16).

Stone World is challenging the consequential order premised on want of jurisdiction which falls under ground (a), as the court which granted it was purportedly not competent to deliver it.

[94] This court in *Lua & Mansor (suing as a firm) v Tan Ah Kim* [2017] 3 MLJ 371; [2017] 2 CLJ 175 ('Lua & Mansor') had the occasion to explain the

full breadth of the implication of s 44 of the Evidence Act 1950 when it held:

> [29] The scope of s 44 above is to allow a party to a suit or other proceedings to avoid the effect of a judgment or any order of a court on any of the three grounds cited in that provision. It is a permissive provision that allows impeachment of judgment which is a nullity by proving either of the three grounds exists. This provision is contained in the part of the Evidence Act which deals with the relevancy of judgment or order of a court. It is for the purpose of allowing a party in a proceeding to adduce evidence or to prove to the court that the judgment or order is obtained by the wrongful or illegal way. It is neither a provision that provides a remedy nor does it confer on the court the authority or jurisdiction on how to deal with such impugned judgment or order. This is understandable because it deals with the right of a party to raise relevant evidence. The recourse opened to the plaintiff to set aside any wrongful order lies in the rule as enunciated by the Federal Court in *Badiaddin*. Section 44 is supplemental to that rule and it deals with the right to adduce evidence for that purpose.

[95] Although this court in *Lua & Mansor* did not take into account *Seruan Gemilang* in the judgment, there is no error in what was stated at para 29 in its explanation of s 44 of the Evidence Act 1950. Counsel for Stone World submitted that the Federal Court in *Seruan Gemilang* recognises s 44 of the Evidence Act 1950 as a cause of action; however, our perusal of the said case does not appear to be so. Although the Federal Court in *Seruan Gemilang* said at para 31 that 'The law recognises this type of cause of action', it was not referring to s 44 of the Evidence Act 1950 as being a cause of action. One has to read the earlier paragraph to understand what the Federal Court meant as 'recognises this type of cause of action'. For this, we reproduced the earlier para 30 of *Seruan Gemilang* which states:

> [30] The respondent's action in the present case is to impeach or set aside the earlier judgment which was obtained by the appellant against the respondents at the Kuantan High Court on 25 July 2007 on the ground of fraud and/or perjury committed by the appellant's witness during that earlier trial. *The claim is by way of a fresh action based on fresh evidence* which could not have been obtained at the earlier trial.
>
> [31] *The law recognises this type of cause of action*. Section 44 provides that 'Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss 40, 41 or 42 and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion'. This provision is an exception to the doctrine of res judicata as provided for under s 40 of the same Act.

The phrase 'The law recognises this type of cause of action' was in effect referring to the claim by way of fresh action based on fresh evidence in that case which could not have been obtained at the earlier trial. This was fortified when the Federal Court further held:

A

[32] *The impeachment action must be by way of a fresh action*, not in the same action where the impugned earlier judgment was made. As early as 1935, Whitley in Penang High Court case of *Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt* [1935] 1 MLJ 31, relying on English authorities of *Cole v Langford* [1898] 2 QB 36; *Priestman v Thomas* [1884] 9 PD 270; *Duches of Kingston's Case 2 Smith LC* (13th Ed) 644; and *Patch v Ward* [1867] LR 3 Ch App 203, ruled that. 'The court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, *the proper remedy being an original action and not a re-hearing*'. (Emphasis added.)

B

C

[33] The same principle was adopted by the Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where Chang Ming Tat FJ rules that '... if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, *a fresh action will lie to impeach the original judgment* ...'. (Emphasis added.)

D

The principle stated by *Seruan Gemilang* is that the law recognises a fresh action to impeach an earlier judgment. *Seruan Gemilang* was not in relation to s 44 of the Evidence Act 1950 being a cause of action.

E

[96] Stone World sought to show that the consequential order delivered by the court on 16 October 2015 was for want of jurisdiction and therefore impeachment may lie as established in *Badiaddin*'s case. We did not see any error on the part of the learned High Court judge when Her Ladyship held that s 44 of the Evidence Act 1950 has no relevance to the present case. It is not a substantive right provision. Whether it was filed under s 44 of the Evidence Act 1950 or whether it was to prove lack of jurisdiction, what must be established is nothing short of a defiance of a substantive statutory provision as established in *Badiaddin*. *Seruan Gemilang* dealt with an application under O 18 r 19 of the ROC and the basis of the impeachment was on ground of fraud and/or perjury committed by the appellant's witness during the earlier trial. The way to deal with it is by way of a full trial, not in a summary striking out process. The court in *Seruan Gemilang* referred to *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 ('Chee Pok Choy & Ors') where this court emphasised the requirement that the allegation of fraud must be established by evidence adduced during trial. Further the Federal Court at para 57 said:

F

G

H

[57] ... the respondents' statement of claim have sufficiently pleaded all the relevant particulars or elements to set for trial an action to impeach or set aside the earlier judgment as stated earlier either on ground of fraud or on ground of fresh/new evidence. The action is based on a valid cause of action recognised by law. Therefore, the respondent's action as well the issue of fraud as pleaded therein, cannot be said to be frivolous, vexatious and an abuse of process of the court.

I

Res judicata

[97] One of the reasons for the dismissal of the application for impeachment was the operation of the doctrine of res judicata and issue estoppel. The learned High Court judge relied on the judgment of Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 ('Asia Commercial Finance (M) Bhd') which had discussed the doctrine of res judicata or the doctrine of *estoppel per rem judicatum* at great length at pp 197–200 (refer to para 60 of the grounds of the judgment of the learned High Court judge). For res judicata to apply, authorities have established that the issues must be raised and decided with precision in earlier proceedings which would then operate as a bar to re-litigation. Stone World submitted that in Engareh's case, in respect of the application leading to consequential order, the issue on jurisdiction could not be determined with precision in the earlier proceedings because it (the issue) was not expressly raised nor taken by Stone World in the High Court and in the appeal in the Court of Appeal.

[98] In any event, a decision of a court not clothed with the necessary jurisdiction would not give rise to res judicata (refer to the Federal Court case of *Government of India*). Therefore res judicata has no application in favour of Engareh.

[99] Stone World submitted that the learned High Court judge erred when Her Ladyship held that the doctrine and principles of issue estoppel should apply in the interest of justice in favor of Engareh. The learned High Court judge held that Stone World should have and could have raised the issue of want of jurisdiction previously.

[100] It was submitted that the wider issue of estoppel has no application if the consequential order was granted for want of jurisdiction or has no jurisdiction to grant the initial judgment in the first place (refer to *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 at p 178) ('Federal Hotel Sdn Bhd').

[101] Since we had already made a finding that Stone World failed to prove any substantive contravention of statutory provision as established by *Badiaddin* when the court granted the consequential order, therefore the court was clothed with the jurisdiction to grant the same. Hence, the submission by Stone World that res judicata and estoppel do not apply is without merits. The grounds relied upon by Stone World in filing the OS clearly cannot succeed as they are barred by res judicata.

[102] On res judicata, we referred to *Henderson v Henderson* [1843] 3 Hare 100 at p 114 ('Henderson') where Wigram VC had this to say:

> In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[103] There are two kinds of *estoppel per rem judicatum*. The first type relates to cause of action estoppel and the second is a development of the first type, namely, relates to issue estoppel. The learned High Court judge found that issue estoppel operates on the broader approach as explained by His Lordship Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd* where Peh Swee Chin FCJ said:

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel per rem judicatum.

The learned Peh Swee Chin FCJ also referred to the judgment of Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 ('Greenhalgh') at p 257 as follows:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[104] We agreed with the learned High Court judge that Stone World could and should have raised the argument that Engareh's recourse was under O 45 r 4 of the ROC rather than O 37 r 4 and/or O 92 r 4 ROC as prayed in Engareh's notice of application. This point was not taken at the hearing of the said notice of application for the consequential order and neither was it done at the appeal of the same in this court. Hence the learned High Court judge did nor err when she found that the principle of the doctrine of res judicata and issue estoppel applied in the interest of justice to Engareh.

[105] The learned High Court judge also considered the time taken between the date of the initial judgment until the date of the consequential order which is four years and three months, and almost three years has passed since the date of the consequential order until the date of the originating summons for the impeachment proceedings. By that time the materials which was in the possession of Stone World had deteriorated and became fragile and its value had diminished tremendously due to weather elements. In light of the continuous refusal by Stone World to comply with the initial judgment, clarification order, consequential order, assessment orders, Stone World should not be allowed to re-litigate the matter premised under the guise of an impeachment proceedings. This is one case where finality in litigation must be upheld. Stone World has had the benefit of and had in fact pursued all opportunities to have all the facts and/or law considered relevant put before the court in Suit 85 and the hearing of the summons in chambers to strike out the petition to wind up Stone World, in the Winding Up Court but the said summons in chambers was dismissed by the Winding Up Court. This also included the recourse to the appeal procedures subsequently.

[106] This court in dismissing Stone World's appeal against the consequential order was also cognisant of all the facts leading to the consequential order and ultimately had affirmed the decision of the High Court in granting the consequential order. There has been no motion for leave to further appeal to the Federal Court against that decision of this court.

[107] Thus the doctrine of res judicata and issue estoppel should apply in the interest of justice premised on the factual matrix of the case. Clearly, the OS is a back door attempt by Stone World to reopen a dispute which had been fully determined to its finality until the Court of Appeal and there is nothing more to be tried. If this is not an abuse of process of court, we do not know what is.

CONCLUSION

[108] Given the aforesaid, we did not find merits in the appeal and found that the learned High Court judge did not err in her findings which warranted our appellate intervention. Therefore, unanimously, we dismissed the appeal by Stone World (the appellant) and affirmed the learned High Court judge's decision with costs of RM20,000 subject to allocatur fees.

Appeal unanimously dismissed and the High Court's decision affirmed.

Reported by Ashok Kumar